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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS

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COURT OF CRIMINAL APPEALS
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COBY RAY HUDGINS
Appellant

NO. PD-163-17

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE
124TH JUDICIAL DISTRICT COURT OF GREGG COUNTY, TEXAS
NO. 43,645-B

******

APPELLANT'S BRIEF ON THE MERITS

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Table of Contents

Identity of Parties and Counsel 2

Index of Authorities 5

I. Statement of the Case 8

II. Issue Presented 8

Is it error to declare trial counsel ineffective for failing to investigate and present evidence when, at the motion for new trial hearing, Appellant presented no evidence demonstrating that the investigation and additional evidence would have been beneficial?

III. Statement of Facts 9

A. Arrest, Indictment and Pre Trial Matters 9

Motion Suggesting Incompetency 9

B. Jury Trial- Guilt Innocence Phase 12

Coby Ray Hudgins 12

The Verdict 16

C. The Punishment Phase 16

Ricky Hudgins 16

Michael Hudgins 16

Betty Jean Tucker 20

The Verdict on Punishment 21

Motion for New Trial 21

Wade French. Ed. D. 22

Coby Ray Hudgins 23

F.R. "Buck" Files, Jr. 25

R. Daryll Bennett 33

IV. Argument and Authorities 40

V. Summary of the Argument 40

VI. The Law and Precedents 40

VII. Analysis of Issues One, Two and Three 46

VIII. Issue- Restated 46

IX. Conclusion 52

X. Prayer 52

XI. Certificate of Service and Certificate of Compliance 53

Index of Authorities

Cases

Ake v. Oklahoma 470 U.S. 68 (1985) 27, 28, 29, 45, 48

Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981) 43

Bone v. State, 77 S.W.3d 828 (Tex. Crim. App. 2002) 41, 42

Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir, 1990) 43, 44

Busby v. State, 990 S.W.2d 263, 269 (Tex. Crim. App. 1999) 42

Conrad v. State, 77 S.W.3d 424, 426 n.13 (Tex. App.—Fort Worth 2002, pet. ref'd) 44

Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) 45

DeFreece v. State, 848 S.W.2d 150 (Tex. Crim. App. 1993).....26, 28, 29, 30, 44, 47, 48

Ex Parte Briggs, 187 S.W.3d 458 (Tex. Crim App. 2005).....28, 45, 48, 52

Ex parte Imoudu, 284 S.W.3d 866 (Tex. Crim. App. 2009) 51

Ex parte Lahood, 401 S.W.3d. 45 (Tex. Crim. App. 2011) 51

Ex parte Martinez, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011) 41, 43

Ex parte Miller, 330 S.W.3d 610, 616, n. 10 (Tex. Crim. App. 2009) 41

Ex parte Nailor, 149 S.W.3d 125, 130 (Tex. Crim. App. 2004) 41

Ex parte Ybarra, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982) 43

Freeman v. State, 167 S.W.3d 114, 119 (Tex. App.—Waco 2005, no pet.) 44

Garcia v. State, 757 S.W.3d 436, 440 (Tex. Crim. App. 2001) 41

Hudgins v. State, No. 12-15-00153-CR, 2017 Tex. App. Lexis 597 (Tex. App. –Tyler Jan. 25, 2017) (not designated for publication) 51

Jackson v. State, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) 41

Menefield v. State, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) 41

Mitchell v. State, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002) 41

Ortiz v. State, 93 S.W.3d 79, 88-89 (Tex. Crim. App. 2002) 41

Profitt v. Waldron, 831 F.2d 1245, 1248 (5th Cir. 1987) 42

Ramirez v. State, 301 S.W.3d 410, 415 (Tex. App.—Austin 2009, no pet.) 46

Riley v. State, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012) 46

Rylander v. State, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003) 41

Smith v. State, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009) 42

Strickland v. Washington, 466 U.S. 668 (1984) 28, 40, 41, 42, 43, 44, 47, 52

Thompson v. State, 9 S.W.3d 808 (Tex. Crim. App. 1999) 40, 42

Tong v. State, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000) 41, 42

Villa v. State, 417 S.W.3d 455, 462-63 (Tex. Crim. App. 2013) 41

Wiggins v. Smith, 539 U.S. 510 (2003).....28, 31, 33, 43, 44, 47, 49, 52

Williams v. Taylor, 529 U.S. 362, 382 (2000) 42

Wright v. West, 505 U.S. 277, 308 (1992) 42

Other Authorities

U.S. Const. amend. VIII..... 40

Texas Const. Art. 1, Section 10 40

Tex. Code Crim. Proc., Art. 1.051(a)..... 40

All references to Texas Statutes, rules, etc. are to the latest edition published by West Publishing Company, unless otherwise noted.

NO. PD-163-17
IN THE COURT OF CRIMINAL APPPEALS
FOR THE STATE OF TEXAS

COBY RAY HUDGINS
VS.
THE STATE OF TEXAS

APPEALED FROM THE 124TH DISTRICT COURT, GREGG COUNTY
TRIAL CAUSE NO. 43,645-B

BRIEF FOR APPELLANT

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

An accused in a criminal case is entitled to effective assistance of counsel at trial. The State complains that the Appellant cannot show deficient performance of his trial counsel without presenting specific, admissible evidence. How can the sufficiency of evidence that could be presented be determined without its full presentation to a finder of fact? How can the evidence presented in this matter at the motion for new trial be considered inadmissible when no objection was by the state to its admission at the time it was presented? Surely Appellant is not required to retry the entire case at a motion for new trial hearing for his trial counsel's to be rendered ineffective given the totality of the circumstances presented in this case. Certainly the impact of trial counsel's deficient investigation on the Appellant who received a 99 year sentence outweighs the consequence to the attorney that failed to investigate and present the evidence.

Statement Regarding Oral Argument

Neither the State nor the Appellant requested oral argument, and the Court did not grant argument.

Statement of the Case

Appellant was charged with murder. Upon a jury trial, Appellant was found guilty, and at the conclusion of the punishment phase, the jury assessed a sentence of ninety-nine (99) years confinement in the Texas Department of Criminal Justice, Institutional Division. A hearing on a motion for new trial was then held, at which relief was denied. Based on the evidence presented to the trial court, the twelfth court of appeals issued its opinion reversing the trial court's decision to deny the Motion for New Trial and reversed and remanded the cause for a new trial on the issue of punishment only.

Statement of Procedural History

The court of appeals reversed the trial court's denial of Appellant's motion for new trial and remanded for a new punishment hearing. Hudgins v. State, No. 12-15-00153-CR, 2017 Tex. App. Lexis 597 (Tex. App. –Tyler Jan. 25, 2017) (not designated for publication). The State did not file a motion for rehearing. The State's petition for discretionary review was granted on May 24, 2017.

Issue Presented

IS IT ERROR TO DECLARE TRIAL COUNSEL INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE WHEN, AT THE MOTION FOR NEW TRIAL HEARING, APPELLANT PRESENTED NO EVIDENCE DEMONSTRATING THAT THE INVESTIGATION AND ADDITIONAL EVIDENCE WOULD HAVE BEEN BENEFICIAL?

I. Statement of Facts

A. Arrest, Indictment and Pre-trial Matters

On October 6, 2013, Coby Ray Hudgins, Appellant was arrested for the offense of murder. (CR 8) On October 10, 2013, Appellant's trial counsel, R. Daryll Bennett, posted an attorney bond in the amount of one hundred thousand dollars ($100,000.00) to secure the release of the Appellant from jail that was approved by the Gregg County Sheriff's Office on October 11, 2013. (CR 8). Appellant paid Mr. Bennett a fee of ten thousand dollars ($10,000.00) for the attorney bond and a fee of twenty-five thousand dollars ($25,000.00) to represent him in the murder case. (9 RR 35). There was no written agreement for representation between Appellant and Mr. Bennett. (9 RR 35).

The Gregg County Grand Jury grand jury returned a true bill of indictment against Appellant for the offense of murder on April 10, 2014. (CR 5). Mr. Bennett appeared as counsel in the case by filing a waiver of arraignment on behalf of Appellant on April 21, 2014 and the cause was set for a status hearing on June 6, 2014. (CR 9).

Motion Suggesting Incompetency

On August 5, 2014, Mr. Bennett filed a "Motion Suggesting Incompetency and/or Insanity Request for Examination" specifically requesting that "Edward B. Gripon, M.D.P.A." be appointed to evaluate the appellant as provided by Article 46B of the Texas code of Criminal Procedure. (CR 13-14). Mr. Bennett attached the resume and fee schedule of Dr. Gripon to his August 5, 2014 motion. (CR 13-19). On September 30, 2014 Mr. Bennett filed a motion entitled "Amended Motion Suggesting Incompetency and/or Insanity Request for Examination". (CR 20-

21) The August 5, 2014 motion was amended adding the following paragraph to his prior motion:

> Defendant requests in the event the Court grants the motion for examination to determine incompetency and/or insanity of Defendant, that Gregg County pay the costs for such examine [sic].

An oral hearing was set in open court on the Appellant's motion for October 2, 2014. At the hearing, the following exchange between trial counsel and the trial court occurred:

> THE COURT: All right. We're here on the defendant's motion for competency examination and/or pleading insanity.
>
> Mr. Bennett, it's your motion. You may present it.
>
> MR. BENNETT: Yeah, Judge. This is more -- and I'm not -- **I don't think the boy is insane or maybe not incompetent, it has more to do with the reason this happened; the reason being that he was molested as a child by his own cousin -- who was in the courtroom the other day with him, matter of fact -- and the new theories out there about what cause -- what motivates people to, number one, get guns; number two, to be scared. That's going to be a factor in this case when it goes to court.**
>
> And to my understanding and research, there's -- the person who is pushing this is the one I requested from Beaumont, Texas; a very successful doctor of psychiatry. And it's a new field that I don't know that much about, Judge, and I'm not sure too many people do.
>
> And I would just -- and I'm not saying Dr. -- the doctors you use; I know them, I know them well. And I -- and I respect them and all. **But it would be good to have a -- new ideas put into our system and new things to work with, Judge. And -- and I would like to learn it. I would like to learn what these theories are and how they approach it, personally. So that's the reason I'm asking for this -- this guy, Judge.**
>
> **And if my client had the money and the resources -- he don't even have a job now -- I'm sure I could get him and his family to do it, if they had the money. But they don't have the money.** His aunt and grandmother just had a wreck, and his aunt died last Saturday, a week ago, in a car wreck. And

grandmother is still in the hospital, I believe –

THE DEFENDANT: She's out.

MR. BENNETT: No, she's out. So they've been through a bad time. I -- I'd just like to try new blood, Judge, is what I'm talking about.

THE COURT: Well, it sounds -- but what you said -- first of all, does your -- do you believe your client has the sufficient present ability to consult with you with a reasonable degree of rational understanding?

MR. BENNETT: I -- I would -- ***I would usually have said yes until I found out what these theories are and all on -- on children that are -- are sexually molested and what their problems are. Judge, I -- I'm just not sure of that anymore.***

As far as being able to talk to him, sure, I can talk to him. As far as what happened, that's kind of bleaky, too, because of the conditions that were in effect that night. ***I'm more wanting to be one who can testify as to why someone would be scared of somebody who had sexually molested him when he was a child and how that affects him –***

THE COURT: That's different from competency.

MR. BENNETT: It is -- well –

THE COURT: **You're ask -- you have asked for a motion for incompetency or sanity evaluation, and – but what you're telling me, the reasons for it is really more defensive issues.**

MR. BENNETT: No, Judge, it's -- it's not. It's whether or not he was -- he -- his memory and the ideas he was going through at the time, whether he was competent at that time, because of what he went through and what -- what he was trying -- because at the time, the guy who he testified to and sent to prison had just got out of prison and had told him, when he went, he was going to get him. So was he competent at the time? I don't know what insanity is at that point.

THE COURT: Well, for purposes of a sanity or competency evaluation, I believe the issue has been raised. I am not going to appoint this doctor. First of all, the Court has no knowledge of this doctor. Secondly, this is a court-appointed physician and, reading the doctor's fee schedule, would probably cost the county over 5,000 or $6,000. I will appoint Dr. Tom Allen to examine him for purposes of incompetency and/or sanity.

If the defense wishes a different expert for purposes of trial, then they can petition the Court for that or hire their own expert. That's the ruling of the Court.

MR. BENNETT: Thank you, Judge.

(2 RR 4-7) (Emphasis added).

On October 7, 2014, the trial court issued its written order for examination regarding incompetency and/or insanity. (CR 23-25). On November 7, 2014, Thomas G. Allen, Ph. D. conducted an evaluation of the Appellant in the office of his trial counsel for the purposes of addressing the issues of competency to stand trial as set forth in Article 46B.003 of the Texas Code of Criminal Procedure and the affirmative defense of insanity pursuant to Chapter 8.01 of the Texas Penal Code. (CR 98-104). Dr. Allen opined that the Defendant was competent to stand trial and that the Appellant was legally sane at the time of the conduct charged. (CR 101, 103).

B. Jury Trial- Guilt/Innocence Phase

On March 16, 2015 this case was called for jury selection. (4 RR 11). The jury was seated on that date. (4 RR 107). On March 17, 2015 the jury was sworn. (5 RR 13). The case was then called, the indictment was read and the Appellant entered his plea of "not guilty". (5 RR 18-19). The State opened and presented its case, resting on March 18, 2015. (5 RR *passim*; 6 RR 139).

Coby Ray Hudgins

At a hearing outside the jury's presence, the Appellant was called to testify. (6 RR 143-44). The Appellant expressed an insistence to testify before the jury at the guilt/innocence phase

of the trial. (Id.) The Appellant took the stand and testified before the court regarding the events of the day leading up to the shooting. (6 RR 146-155).

Trial Counsel for Appellant took the Appellant on v*oir dire* outside the presence of the jury regarding the reason he purchased the gun alleged as the instrument of the crime and the following exchange occurred:

> Q. (by Mr. Bennett): All right. Why did you go buy a gun?
>
> A. (by Appellant) Because I was sexually assaulted when I was a child.
>
> Q. All right. What's that got to do with it?
>
> A. I testified in court against the man who sexually assaulted me when I was a child, and I was threatened. Said when he got out he was going to come and pay me a visit and kill me.
>
> Q. And this guy is who?
>
> A. Dustin Rhan Lay.
>
> Q. And is he kin to you?
>
> A. Yes, sir. He is my -- he's my cousin.
>
> Q. And do you remember what year you were molested? How old were you?
>
> A. I was 11.
>
> Q. You were 11. So that was about in '02, '03?
>
> A. Yes, sir.
>
> Q. Did you eventually testify in court against him?
> A. Yes, sir.
>
> Q. Do you remember what year that was?
>
> A. I'm -- I can't -- it was my sixth-grade year.

Q. But you did testify?

A. Yes, sir.

Q. And did he eventually go to the penitentiary –

A. Yes, sir.

Q. -- over that?

A. He got ten years' probation and had to go to a boys' home or something nother, but he did get in trouble for it.

Q. And were you notified when he was going to get out?

A. I think my mother was, I believe.

Q. But you were underage?

A. Yes, sir.

Q. Somebody notified your mother that he was getting out of the pen –

A. Yes, sir.

Q. -- out of jail? And you remembered what he had told you?

A. Yes, sir.

Q. And it wasn't no doubt in your mind he was going to come after you?

A. No doubt in my mind whatsoever.

Q. In fact, the first -- I believe the first time we even came to court on this for a status docket or something, he was actually in the courtroom –

A. He was sitting right in this courtroom.

Q. -- in jail?

A. Yes, sir.

Q. And you didn't want to come in here?

A. No, sir.

Q. Is there any other -- where did you buy the gun?

A. I got it from an old boy that I had recently met who needed money.

Q. And did you buy the gun strictly because you had been sexually molested?

A. Yes, sir, for protection. I was afraid for my life.

(6 RR 155-58).

Following the proffer above, the state objected to the relevance of the above evidence at the guilt-innocence phase of the trial. (6 RR 158). The court sustained that objection ruling as follows:

> THE COURT: I believe as to the testimony about the sexual assault, I don't believe it is relevant for guilt-innocence. Even if it was deemed to be relevant by a court of appeals, I find under a -- under a 403 analysis that even if it is relevant, that its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues or misleading the jury of consideration -- other considerations that could confuse the -- the jury on the issue of guilt-innocence of intent or recklessness. He can testify to that he had the gun for protection and all those other issues. But as to the sexual assault, I do not believe that is relevant for purposes of guilt-innocence. That's my ruling.

(6 RR 161).

Appellant's testimony was the only testimony offered in his case-in-chief during the guilt-innocence phase. (6 RR 200). The State offered no rebuttal evidence and both sides closed evidence. (Id.).

The Verdict

On March 18, 2015, closing arguments were delivered and the jury deliberated on the issue of guilt- innocence from 4:05 P.M. until 5:49 P.M. (6 RR 217-245; 246-47). The jury returned a verdict finding the Appellant guilty of murder. (6 RR 248).

C. The Punishment Phase

On March 18, 2015 the State commenced its case in the punishment phase. (7 RR 6). The state called Larry Lyons, brother of the victim, and then rested its case on punishment. (7 RR 8-14).

Ricky Hudgins

The Appellant's first punishment witness was his great-uncle Ricky Hudgins. (7 RR 14). Ricky Hudgins testified regarding the Appellant's family history, employment history and to the fact that he was polite and well mannered. (7 RR 14-19). Ricky Hudgins asked for leniency on Appellant's behalf, also stating that Appellant was guilty by his own admission of the offense charged and was punishing himself more than anybody. (7 RR 19-20). Ricky Hudgins' testimony made no reference to the Appellant's childhood history of traumatic sexual abuse. (7 RR 14-20).

Michael Hudgins

The Appellant next called his father Michael Hudgins to testify. (7 RR 20). Michael Hudgins also testified about the Appellant's history and general character. (7 RR 21-25). Michael Hudgins was asked about the reason Appellant had purchased the pistol, giving the following testimony:

Q. (by Mr. Bennett) Did you know when he bought the -- the pistol?

A. (by Michael Hudgins) Yes, sir.

Q. And why did he buy the pistol?

A. He bought the pistol because he was -- he was molested when he was younger by a family member. And when he got out of prison, he had made threats to him. And he wanted to protect hisself.

Q. Now, you said assaulted. How was he assaulted?

A. Sexually assaulted.

Q. At what age?

A. It would be about eight or nine.

Q. And who was this family member?

A. Dustin Lay.

Q. And the -- Lay is on which side of the family, yours or his mother's?

A. It's on my side.

Q. And how close a cousin was he?

A. They were close.

Q. They were raised up together?

A. Yes, sir.

Q. Now, he was charged with molesting Coby?

A. Yes, sir.

Q. And I believe some other members of the family?

A. His brothers.

Q. His brothers. But Coby is the only one that came to court and testified; is that correct?

A. Yes, sir.

Q. He's the only one that had nerve enough?

A. Yes, sir.

Q. Even though he was threatened?

A. Yes, sir.

Q. And you said Dustin Lay?

A. Yes, sir.

Q. And did he go to prison?

A. He was a juvenile. He went -- he was a juvenile and he went to the juvenile court system or whatever, and he went to prison later on.

Q. Yeah. And do you know how long he stayed there?

A. Five years, to the best of my knowledge.

Q. Okay. And then he got out, I believe, February of '13? You –

A. Yes, sir.

Q. You got to answer out "yes" or "no" for the –

A. Yes.

Q. And did that worry Coby?

A. Yes.

Q. Do you know if he -- Dustin Lay contacted him between the time he got out and the time he bought the pistol?

A. He -- he would make threats through other people.

Q. And they would tell Coby?

A. Yes, sir.

Q. So that's why Coby went and bought the gun?

A. Yes, sir.

Q. And that's what Coby told you, wasn't it?

A. Yes, sir.

Q. What exactly did he tell you about it?

A. He said that's, "He's not going to come to my home and -- and -- and hurt me. I'm not going to live in fear."

Q. Because Coby was scared of him, wasn't he?

A. Yes, sir.

Q. Now, Dustin Lay is back in jail, is he not?

A. Yes, sir.

Q. In fact, the first -- one time we come to court here, Dustin was over there in the jail clothes in this court?

A. Yes, sir.

Q. And Coby wouldn't come in, would he?

A. He didn't want to.

Q. I made him finally come in, didn't I?
A. Yes, sir.

Q. Now, that's had an impact on Coby's life, hasn't it?

A. Yes, sir.

Q. Very much, hasn't it?

A. Yes, sir.

Q. And I mean, for people who have never been sexually assaulted as a kid, we don't know what you go through, do we?

A. No, sir.

Q. But it's -- it's got to be bad?

A. I would imagine.

Q. Now, we're not using that excuse for what happened with Kayla, are we?

A. No, sir.

Q. But the jury's got to decide punishment, and they got to know something about Coby. Coby as a -- as a kid, how would you explain to the jury he was?

A. He was a good kid. He played baseball, he – he was just a normal kid. He was happy, fun-loving.

Q. Did he ever get in trouble?

A. I mean, he was a kid, but he never got in nothing major, no serious -- not much fights or anything else. I mean, he got along with everybody.

Q. Has he ever been violent that you know of?

A. No, sir.

Q. Never has, has he?

A. No, sir.

(7 RR 25-28). Michael Hudgins further requested leniency from the jury on Appellant's behalf. (7 RR 29).

Betty Jean Tucker

Appellant's last punishment witness was his maternal grandmother, Betty Jean Tucker. (7 RR 31). Betty Jean Tucker testified that she had raised Appellant as one of her own effectively, given his parents' young age at his birth, and to his general character. (7 RR 31-34). The extent of Betty Jean Tucker's testimony regarding Appellant's childhood sexual assault was as follows:

Q. Did you know when he was sexually assaulted?

A. Yes, I did.

Q. That whole family went through that together, did they not?

A. Yes, we did. It was very hard.

Q. And did you know Dustin Lay?

A. No. I knew he was in Michael's side of the family. But as to personally have ever met him I -- I do not remember it. I don't think so.

Q. Did you come to court with him when he testified?

A. Yes, I did.

(7 RR 35).

The Verdict on Punishment

Appellant did not take the stand to testify at the punishment phase of the trial and rested his case. (7 RR 41). All parties closed evidence, the jury charge was read, and arguments were made to the jury. (7 RR 41-60). The jury deliberated on punishment and returned a verdict of 99 years in the Texas Department of Criminal Justice and no fine. (7 RR 63; CR 71).

D. Motion for New Trial

On April 16, 2015 Appellant filed his Motion for New Trial and Motion in Arrest of Judgment. (CR 76). The Motion was presented to the trial court on April 16, 2015 and a hearing was set for May 22, 2015. (CR 95). On May 22, 2015 the hearing on Appellant's Motion for New Trial was commenced. (8 RR 4). Issues arose regarding the production of Mr. Bennett's file regarding the matter at the time of the hearing. (8 RR 6-9). The parties agreed and the Court ordered that the finalization of hearing would be continued to June 1, 2015. (8 RR 10). However,

on May 22, 2015, the Appellant did call Wade French, Ed.D. regarding the issue of presenting testimony about prior trauma, Post Traumatic Stress Disorder, and presentation of mitigating evidence. (8 RR 12-25).

Wade French, Ed.D.

Dr. French explained his qualifications and licensing, he has served as a mental health expert in every county in Northeast Texas and in the Federal Courts of the Eastern District of Texas. (8 RR 12-13).

Dr. French explained that symptoms of prior trauma, which he described as an experience that people have that is beyond what a person would normally have or experience, may arise from a number of circumstances, including being sexually assaulted. (8 RR 13-14; 16). Dr. French described the symptoms of prior trauma as a "startled response", recreating in the person's mind the traumatic event, intrusive thoughts, panic attacks and anxiety, sleep disturbance and a constant state of physical fatigue. (8 RR 14-15). He explained further that Post Traumatic Stress Disorder (P.T.S.D.) is broken into two categories: post traumatic stress reaction, which happens close in time to the event; and delayed P.T.S.D. in which symptoms may occur from six months after the event to eight to ten years after the event. (8 RR 15). He explained that P.T.S.D. is a disabling diagnosis, and can cause patients to qualify for permanent disability, being unable to hold normal employment. (8 RR 15). Dr. French testified that traumatic events can cause exaggerations in a person's behavior, causing them to basically be unable to live a normal life and care for themselves physically and emotionally in a way that is productive. (8 RR 17). He testified that people experiencing delayed P.T.S.D. do not often seek treatment for their symptoms due to a lack of understanding that their current symptoms are

linked to a remote traumatic event, as well as shame and guilt. (8 RR 18-19). P.T.S.D. is a mental illness, listed in the Diagnostic and Statistical Manual. (8 RR 19).

Dr. French defined mitigating evidence as something that would reduce a person's moral blameworthiness. (8 RR 19). Dr. French has presented to triers of fact information about trauma as mitigating evidence for a defendant, and has found that information helpful to them. (8 RR 19-20).

Dr. French also testified that he has primarily worked in the area of risk assessments having to do with the probability of certain future behaviors occurring. (8 RR 22). In the context of a risk assessment Dr. French would look at certain predisposing factors to determine how many of them were present, to what degree they are present, and their severity to render an opinion on the probability that certain future behaviors would occur. (8 RR 22). Dr. French is able to and has in the past provided testimony to a trier of fact about the probability of someone's future risk or future danger. (8 RR 23).

Dr. French did not specifically evaluate the Appellant. (8 RR 24). However, if asked, Dr. French could interview a person, determine whether or not they have had specific traumas and offer an opinion as to how that affects them to a trier of fact. (8 RR 24). Dr. French testified that his standard fee for a risk assessment or to evaluate someone and determine if past instances in their life could be presented as mitigating evidence is $2,500.00. (8 RR 25).

Coby Ray Hudgins

The Appellant's hearing on his Motion for New Trial and Motion in Arrest of Judgment was reconvened on June 1, 2015. (9 RR 5). Appellant was called to testify. (9 RR 7). Appellant's first meeting with trial counsel was within a week of making bond, at Mr. Bennett's

office. (9 RR 7). Appellant had limited discussions with trial counsel about witnesses for punishment, limited mostly to family. (9 RR 9). Mr. Bennett and his staff did not assist the Appellant in reaching his preacher to testify for punishment and did not ask about any teachers or employers who might testify on Appellant's behalf, although Appellant believed such witnesses might have testified for him. (9 RR 9-10).

Appellant testified that Mr. Bennett briefly discussed with him his history of being sexually assaulted as an 11 year old. (9 RR 11). Appellant was in counseling and on medication following his sexual assault, but Mr. Bennett did not try to obtain records of that treatment. (9 RR 14).

Appellant testified that Mr. Bennett had discussed the Bernie Tiede case with him, and Mr. Bennett told him that case had a lot to do with sexual assault, similar to his case. (9 RR 11). Appellant testified that Mr. Bennett specifically discussed trying to contact the doctor who examined Bernie Tiede, and believed that Mr. Bennett had gotten in touch with that doctor. (9 RR 12). Appellant believed that it would have cost him "around 4 grand" just to see the doctor for the first time. (9 RR 12). Mr. Bennett's plan to get the doctor to work for Appellant was to "try to get the State to pay for it". (9 RR 12). Other than having a hearing over that doctor's assignment to his case, neither Mr. Bennett nor anyone working for him made any further effort to facilitate Appellant's meeting with the doctor from the Bernie Tiede case. (9 RR 12).

Dr. Mark Miller in Kilgore, following the shooting that led to his murder charge treated Appellant and prescribed psychotropic medications to Appellant, but Mr. Bennett did not discuss that treatment with Appellant. (9 RR 14; 28-29). Mr. Bennett did not seek a release to obtain those treatment records either. (9 RR 14).

F.R. "Buck" Files, Jr.

Appellant also called Frederick Rimes "Buck" Files, Jr. to testify on his behalf at the June 1, 2015 hearing regarding the standards of practice by a criminal defense attorney in a criminal case. (9 RR 30). Mr. Files set forth his experience and qualifications for the court: He has been licensed to practice law since September 17, 1963, has held a board certification of specialization in criminal law from the Texas Board of Legal Specialization since 1975 and has been certified by the National Board of Trial Advocacy since 1997. (9 RR 31). Mr. Files served on the Criminal Law Advisory Commission of the Texas Board of Legal Specialization for six years, was the chair of that board for four years. (9 RR 32).

Mr. Files testified regarding his familiarity with the Performance Guidelines for Non-Capital Criminal Defense promulgated by the Court of Criminal Appeals and adopted by the Board of Directors of the State Bar of Texas. (9 RR 32). Those guidelines specifically address mitigating evidence as one of the areas that must be explored from the initial interview through the investigation to what has been produced at trial. (9 RR 32-33). Files opined that mitigation is something an attorney should look at the first day and carry though the entire time you are preparing for trial or even trying the case, you continue to look for things until the trial is over. (9 RR 45-46).

Mr. Files reviewed trial counsel's file for Appellant's case specifically looking for attempts to locate mitigating evidence. (9 RR 33). Other than a file entitled "probation witnesses" that contained information on two witnesses and one question in his *voir dire* examination notes as to whether anyone had been the victim of sexual assault, nothing else was found. (9 RR 33). Files noted that it appeared from the file that "there was obviously no attempt

to go beyond just a cursory conversation with the defendant or with his family" in investigation of mitigating evidence. (9 RR 46). Files testified that the scope of the investigation is an aspect of reviewing the performance of trial counsel, not just the failure in presentation of the evidence gathered. (9 RR 40). He opined that "if you don't exhaust every avenue to find out what is out there, then you cannot make an intelligent decision on what to put on." (9 RR 40). Files opined that Mr. Bennett "put all of his eggs in one basket; that is, shooting for guilt-innocence and not looking at mitigation". (9 RR40).

Mr. Files also testified about the standards for appointment of expert witnesses to assist a Defendant in a criminal case. (9 RR 34). Trial counsel had requested to have the court appoint a disinterested witness to address the competency and sanity of the Appellant, and under the trial court's order, any reports generated by that witness would be tendered to the trial court, the Appellant and the State. (9 RR 34)(CR 23-25). Files testified that there was a problem with that request and the order. (9 RR 34). Files stated that the Court of Criminal appeals issued an opinion in *DeFreece v. State,* 848 S.W.2d 150 (Tex. Crim. App. 1993) wherein that court sought to "level the playing field" and authorized the appointment of expert assistance to aid in the investigation, preparation and defense of the case. (9 RR 34). Files testified that if trial counsel had made a request for expert assistance to aid in the defense of the case, any report generated would have only gone to the Appellant's lawyer and would be the outline of a mitigation case. (9 RR 34-35). Files testified that the there was nothing in this case to indicate addressing a competency issue, that the Appellant didn't understand the proceedings, and nothing to be concerned about an insanity defense. (9 RR 35).

Files also addressed the Appellant's trial counsel's failure to file an *ex parte* motion for

expert assistance seek and *ex parte* hearing regarding assignment of an expert witness, as he may have been able to more greatly persuade the trial court to authorize assistance and also not give up his trial strategy to opposing counsel. (9 RR37-38).

Files opined that in this particular case, trial counsel should have requested appointment of a forensic psychologist or forensic psychiatrist to review the impact of the prior sexual assault of the Appellant. (9 RR 38). The forensic mental health professional would have been able to look at the issue of post-traumatic stress disorder causing heightened response to a stimulus, and the personality development of the Appellant as impacted by the prior sexual assault. (9 RR 38). Files stated that the review of the psychologist and his conclusions could have lessened the moral blameworthiness of the individual, and that juries sometime look at people with significant problems sometimes differently than those who have not. (9 RR 39). Files further opined that a lay person, such as the father of the Appellant who testified at punishment can come in and say "this happened", while a forensic psychologist can come in and explain what this happening has led to, how it has affected the individual. (9 RR 40).

Files also opined that the lack of a written contract for employment of trial was a problem in this case, because there was no understanding between Appellant and trial counsel as to who would pay the expense of an expert witness. (9 RR 36). Files testified that in a situation where there is hired counsel and the defendant does not have enough money to get the experts that the lawyer wants, the lawyer has three options in the case, take the case for a reduced fee and continue, have application for appointment of counsel under *Ake v. Oklahoma* 470 U.S. 68 (1985), or withdraw or attempt to withdraw from representation. (9 RR 41-42). Files testified that trial counsel could have sought appointment of an expert form the court even though he was

retained counsel, not appointed counsel. (9 RR 42). Files stated that "an economic decision is not a strategic one" citing *Ex Parte Briggs,* 187 S.W.3d 458 (Tex. Crim App. 2005). (9 RR 42). "If Mr. Bennett had a $25,000.00 flat fee that did not provide for experts, and his decision to get Dr. Allen was based on economics, he had the ability to come to the court under *Briggs* and say, 'I need somebody to assist me and my client in the investigation, preparation and trial of the case' not some disinterested expert." (9 RR 42).

Files was asked to address trial counsel's performance in light of the *Strickland* standard and testified as follows:

> Q. (by Mr. Larison): The *Strickland* standard, that is, one, that a -- counsel's performance falls before an objective level of reasonableness. Let's go with that first. What concerns do you have about the file in the case that you reviewed on this, for that prong of Strickland?
>
> A. (By Mr. Files): We begin with the failure to have a contract, which sets out an overview of the possibilities in the case and the -- the experts that would be needed.
>
> We look at the file and we find the – under request for the appointment of an independent expert. I would suggest that any lawyer who would file that in this particular case chose an abysmal ignorance of *Wiggins*, of *Ake*, of *DeFreece*, especially *DeFreece*, and also bigs -- *Briggs*.
>
> The file itself has the -- the names of two witnesses in a file listed, "Probation Witnesses." There was obviously no attempt to go beyond just a cursory conversation with the defendant or with his family.
>
> There is no -- in -- in some cases, there is a bona fide concern as to whether or not someone has been physically abused, sexually assaulted, whatever, or whether it's just a -- an excuse that someone has conjured up. In this particular case, the defendant was a victim in a case that was prosecuted here in Smith County, so –
>
> Q. Gregg County?
>
> A. **I mean, excuse me, in Gregg County. -- so that everyone involved in the**

case was aware that he had been -- been a victim in a case that was prosecuted here. It wasn't a "Maybe it happened," or "It could have happened." There's no question but that it did happen. You have the Court of Appeals opinion on it.

If I may go through briefly looking at some other notes that I have here.

We go to the Disciplinary Rules of Professional Conduct, we also go to the Performance Guidelines for Non-Capital Criminal Defense Representation. And we know that the duty of a lawyer in a case is to provide zealous and effective representation for the defendant at all stages of the criminal process. I cannot find any zealous representation during the mitigation portion of the trial.

General Duties of Defense Counsel, 1.13 [sic] of the Guidelines. "Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to confirm that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.

I don't mean to kick a dead mule, but the idea of asking for a disinterested expert in the case rather than to have your own expert, as suggested by *Ake* and then *DeFreece*, is just remarkable. I don't know how anyone can justify having -- having made that decision. I don't know how anyone can suggest that he was really asking for an *Ake* expert but, gosh, he just did it wrong.

Guideline 4.1, Investigation. "Counsel has a duty to conduct or secure the resources to conduct, an independent case review and investigation as promptly as possible." Just not done in this case.

Information in the possession of third parties. This is a situation where it was obvious – where it's obvious in retrospect that there were individuals who were in possession of knowledge that should have obtained an authorization for release of records.

"Expert assistance."

"Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Counsel should utilize, as I earlier talked about, ex parte and in camera procedures to secure the assistance of experts when it is necessary or appropriate."

"Mitigate any punishment that may be assessed after a verdict or plea of guilty to the alleged offense," is one of those things that should be looked at.

"Theory of the Case."

"During investigation and trial preparation, counsel should develop and continually reassess a theory of the case and develop strategies for advancing appropriate defenses and mitigating factors including those related to mental health, on behalf of the client."

In this particular case, defense counsel obviously knew that he had an individual who had been sexually assaulted and asks a question of the panel during voir dire whether or not they've ever been sexually assaulted or -- I -- a member of the family where someone had been sexually assaulted. And then in punishment, if I understand, he put on one witness who testified that the boy had been -- that the defendant had been sexually assaulted, but he doesn't give the jury anything besides that. He doesn't have someone to testify as to the implications, the PTSD, personality development, personality disorders, antisocial personalities, explanations of those, anything to give the jury an excuse for looking at the issue of moral blameworthiness in assessing a lighter punishment.

***

"General Trial Preparation."

"Counsel should complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of: "Subpoenaing and interviewing all potentially helpful witnesses." And this goes back to the experts in the case; the mental health professionals who could have testified.

"Subpoenaing all helpful physical or documentary evidence." Obviously there were records here that were obtainable.

"Obtaining funds and arranging for defense experts to consult or testify on evidentiary issues that are potentially helpful." And once again we go back to an *Ake* motion or, as *DeFreece* talks about, something other than -- other than a 46.03 motion.

"Obligations of Counsel in Sentencing." "To seek and present to the court all reasonably available mitigating and favorable information that is likely to benefit the client." **If you don't do the investigation, you cannot make a**

knowing decision, an intelligent decision, on what is available or not available.

"Preparation for Sentencing."

A lawyer should, "Obtain from the client and other sources relevant information concerning such subjects as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated." It does not appear that that was done.

Q. Did you find any of the things listed in that laundry list in Guideline 8.3, in the trial file or trial box?

A. Just a moment. Let me look at 8.3.

Q. That's the Preparation for Sentencing?

A. Yes, sir.

Q. I'm sorry.

A. I don't believe so. I don't believe so. Now, the problem with this -- and this is -- this is what basically all of the cases say. The jury is hearing the aggravating aspects of the case, aggravating factors; they're permitted by the Court's Charge to the jury to consider everything that happened during the guilt-innocence stage. **But *Wiggins* has a one-paragraph -- has one paragraph that really enunciates the guts of the problem. Wiggins' sentencing jury heard only one significant mitigating factor, that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history -- and Wiggins suffered from gang rapes and sexual abuse and in different foster homes – his excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.**

The -- the opinions talk about it's speculative to say what a jury would do, and yet they continually say if they had had this kind of evidence, that a jury might have given, could have given, would have given could be reasonably believed to have considered a different punishment than the one assessed.

Q. And obviously the -- the jury can never have that evidence, or the trier

of fact can never have that evidence, if someone hasn't, in the words of Diaz, seek out this type of evidence in -- in an appropriate manner?

A. And **the burden is to do more than just ask a client, "Do you have a problem?" If you know that there's a sexual assault, the lawyer knows that there is a problem. Any lawyer who has participated in any sort of a case involving sexual assault knows the importance of having an expert to talk about the impact of that on the individual who was the victim.**

Tim Proctor, forensic psychiatrist out of Dallas, testifies in -- or is available to the DA's office in dozens of cases. We probably retain him 40 times a year. That is the kind of person. Toni McGarrahan out of – I think also out of Dallas, has this same kind of background.

Ed Gripon was mentioned. Ed Gripon isn't just a journeyman psychiatrist who happens to occasionally take a case. He's from Beaumont. I saw him in a case where there were three former presidents of the American Academy of Psychiatry and the Law and Ed Gripon, who didn't have the title. And the jury obviously paid more attention to Gripon than the rest of them. He is a wonderful diagnostic -- or a psychiatrist with the ability to diagnose and to testify about that.

I know that there was a request made for the Court to appoint him. The Court made a decision not to. And I -- I don't want to speak disparagingly about Tom Allen, who I know testifies over here, but what you need is someone with more specialized training, someone who is a forensic psychologist than rather than simply a psychologist in these kind of cases.

Q. **And you'd also have to give them a direction of where to go and what you're looking for?**

A. **You would. And that -- that's another thing that's not in the file. It is obvious that there was no detailed discussion with Dr. Allen about what was there. Looking for a competency issue or a sanity issue, when you have someone who has been sexually abused and you're not talking about how that impacts their lives and what influence that can have on them and how that can explain things away -- if I had to say that one single thing -- one single piece of the puzzle -- that showed ineffective assistance of counsel, I would -- I would hang it on that.**

There was simply no talking to the court appointed expert about what the goal was, what the lawyer was looking for. He didn't -- he may not have had the person he wanted, he may not have had the person who was best qualified, but he did not talk to that person about what he needed in the case.

> Now, obviously he did talk to him about the fact that he had been sexually abused, but he didn't talk about the -- about how that would relate to mitigating evidence, everything that he -- mitigation. Everything he talked about was the competency or the sanity.
>
> Q. And obviously competency –
>
> MS. BROWN (counsel for the State): Objection, Your Honor. I have to object on that because he -- he has already said he hasn't -- he is basing this on the file and what was put in the file. He wasn't privy to the conversation between Mr. Bennett and Dr. Allen.
>
> THE WITNESS: If I may. May I have just a moment?
>
> THE COURT: Hang -- Mr. Files, as to -- I'm going to -- as to -- as to the question, I'm going to couch that as to what was in the file. I'm going to overrule that objection. The Court will recall what the testimony was and was not. You may continue.
>
> Q. (By Mr. Larison) Even -- let's say -- whether or not he had, Dr. Allen is ordered by the Court to perform a competency and a sanity investigation, not to work for a defendant, evaluating him for a mitigation issue, fair enough?
>
> A. That's correct. Wiggins is a 2003 case. You can't read Wiggins without understanding the importance of looking forward and doing the investigation and focusing on mitigation. You just can't read -- I mean it -- the law is now 12 years old -- the case is 12 years old.

(9 RR 46-55) (Emphasis added).

Roscoe Daryll Bennett

Appellant finally called his Trial counsel R. Daryll Bennett to testify. (9 RR 59). Mr. Bennett testified that he tried to obtain an independent witness to evaluate his client by filing a motion with the trial court. (9 RR 60). Mr. Bennett referred to the motion suggesting incompetency hearing as the means by which he did so. (9 RR 60). When questioned about seeking *ex parte* relief from the court, the following exchange occurred:

Q. (by Mr. Thorson); Did you ask for any ex parte relief in this case?

A. (by Mr. Bennett); "Ex parte"? What do you mean?

Q. Are you aware that you can petition the Court in a criminal case to have an expert appointed to assist you in an ex parte manner, that is, not disclose it to the State?

A. Yeah, I've heard of that. I've never used it.

Q. So you're aware that you could do that in this case, but you didn't do it?

A. I might have been aware, but I didn't do it in this case as far as ex parte, no. I called the doctor, if that's what you mean.

Q. So you did talk to Dr. Allen?

A. Well, I talked to Dr. Allen. But the Gripon, I tried to call him three or four times, and I gave his number and all to my client's dad, in case they wanted to do it.

Q. Did you obtain a price quote from Dr. Gripon to evaluate your client for the purposes of mitigation?

A. I did.

Q. Do you recall how much that was?

A. I don't remember. I didn't write it down. I told –

Q. Did you communicate –

A. I told -- I told my client.

Q. What did you tell your client about that specific incident?

A. What the -- what the price was. I didn't talk to the doctor, I talked to his secretary.

Q. Are you aware of whether your client had the money to pay that doctor to help out in this case?

A. They said they did.

Q. They said they did?

A. Yes.

Q. Did you request that they bring the money to you to hire this doctor?

A. No. I gave them the number and the address and told them to call him to set up a time if they wanted to spend the money.

Q. You didn't actively seek to engage this doctor, as -- as your client's attorney?

A. Well, I did. I gave him -- I called about three or four times.

Q. But he didn't ever evaluate your client?

A. No.

Q. Did you ever send him any money?

A. No.

(9 RR 61) (Emphasis added).

Mr. Bennett was asked about his communication with the trial court appointed psychologist, Thomas Allen, Ph.D. and the following exchange occurred:

Q. (by Mr. Thorson): Did you communicate with Dr. Thomas Allen, Ph.D., after he was appointed by the Court to evaluate your client, Coby Ray Hudgins, for competency?

A. (by Mr. Bennett); Yes.

Q. Did you do that in writing or on the telephone?

A. On the phone.

Q. Did you inform Dr. Allen of your client's history of childhood sexual abuse?

A. Yes.

Q. Did you do that before or after he had rendered his opinion pursuant to

the Court's order?

A. I think it was before. I don't know. That's so long ago, I don't remember.

Q. If his report fails to make any mention of it, is it possible that you didn't discuss it until after the report was rendered?

A. No. Because he laughed at me when I told him what I wanted.

Q. What did you tell him you wanted that resulted in him laughing at you?

A. Well, I told him that I wanted to use the Bernie Tiede defense that he was sexually assaulted as a child and this might have been a point in the murder. He laughed at me. He said there's no such thing.

Q. Following that conversation, did you seek to speak with any other qualified expert in the area of forensic psychology or psychiatry or childhood sexual abuse?

A. No.

***

Q. The doctor that was appointed, pursuant to your motion, by the Court, you spoke to him about it one time; is that fair?

A. Yes.

Q. And he laughed at you and you made no further efforts?

A. That's correct

(9 RR 64-65; 70). Mr. Bennett was further questioned about his efforts to seek mitigating evidence address the issue of the known prior sexual abuse of Appellant, he testified as follows:

Q. (by Mr. Thorson): After knowing and learning of the fact that he had been abused, did you attempt to have him evaluated for post-traumatic stress disorder related to his child-- his status as a childhood victim of sexual assault?

A. (By Mr. Bennett): That's what I had Dr. Allen -- asked Dr. Allen to do.

Q. If your pleadings, your written pleadings, don't reflect that you were requesting that assistance, how is the -- this Court or any other Court to know that that's what you're requesting for, Mr. Bennett?

A. Well, because I talked to Dr. Allen. I guess that's what you're asking.

Q. What did you request that Dr. Allen do?

A. Well, the Judge appointed him to do an insanity at the time of the case, and whether he was insane now. I requested in court that Dr. -- "Groo-pi," whatever his name was, evaluate him as to the effect of sexual assault on him, like he -- like the Bernie Tiede case. The judge refused to. And that's in the record.

Q. Did you make any further effort to seek appointment of a -- of an expert to be employed by your client to assist with your defense?

A. No.

Q. The only effort you made, then, to have expert assistance in this case was by filing a motion to -- for a competency and an insanity evaluation, then, correct?

A. By that doctor in Beaumont, yes.

(9 RR 70-72).

When questioned about his investigation, objective in preparation for trial and seeking mitigating evidence in this murder case the following exchange occurred:

Q. (by Mr. Thorson): Well, it sounds like to me you put all of your eggs in one basket, in the basket of manslaughter in this case; is that fair?

A. Well, my objective was to get manslaughter, if that's what you're talking about.

Q. **But this case has a pretty egregious set of facts; a young girl was shot in the face, multiple shots fired. Are you aware that, you know, an investigation regarding what happens at punishment should have been undertaken?**

A. What -- investigation? How you going to investigate that?

Q. Do you know what mitigating evidence is?

A. Yes.

Q. What is your definition of "mitigating evidence"?

A. It's evidence to show your client to a jury and why it might have happened.

Q. And -- and you had three family members testify about your client and that's it, correct?

A. That's correct. That's all they could find that would testify for him.

Q. Do you understand that -- you know, you have, in the almost 18 months you represented this man, you have a world of expert witnesses you could have engaged to evaluate his history?

A. Oh, yeah, there's a world out there.

Q. And all you did was give your client one phone number?

A. No.

Q. All you did was talk to the Court's appointed doctor one time?

A. I think it was once; might have been twice.

Q. What did you do to follow up with your recommendation that your client call Dr. Gripon?

A. I gave them the number and the address, if they wanted to have it done. But I told them it was not – there was no such thing as a Bernie Tiede defense.

Q. Do you understand that professionals, experts, mental health professionals, can give symptomology and look for PTSD, heightened responses to stimuli, depression, anti-social behavior, and all of those things might affect what a jury might do more than what a layperson can say?

A. That's correct.

Q. But you didn't do that?

A. I –

Q. You didn't seek that testimony?

A. Yes, I did.

Q. Did you ask Coby about his treatment with his doctor in Kilgore, Dr. Miller?

A. Yes.

Q. Did you ever ask him about treatment after his being victimized as a child?

A. Yes. He said he didn't have any problems.

Q. I didn't ask about problems, I asked about treatment.

A. No. He -- he said he didn't have any problems, no treatment.

Q. Did you do anything regarding Dustin Lay other than print out case information from the Gregg County court web site?

A. About Dustin Lay?

Q. Yes, sir.

A. No.

***

Q. You had your hearing, and the Judge said he wouldn't give you the doctor you wanted. You told your client the Judge wasn't going to pay for it; is that true?

A. Yes, I told him that.

Q. You had been paid some $25,000 to represent him in this case?

A. Yes.

Q. Could you have fronted some of that money to help him get an expert retained?

A. No.

(9 RR 81-84) (Emphasis added). Following the argument of counsel the trial court overruled the Motion for New trial and Motion in Arrest of Judgment. (9 RR 99).

II. Argument and Authorities

Summary of the Argument

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL TO APPELLANT BY FAILING TO INVESITAGE AND PRESENT MITIGATING EVIDENCE AT THE PUNISHMENT PHASE OF APPELLANT'S MURDER TRIAL. THE STATE ARGUES THAT THE EVIDENCE PRESENTED AT THE MOTION FOR NEW TRIAL WAS INSUFFICIENTLY SPECIFIC AND NOT ADMISSIBLE. THIS IS NOT A CASE WHERE APPELLANT IS ARGUING THAT HE MET SOME BRIGHT LINE STANDARD OF INCOMPETENCY OR INSANITY. MITIGATING EVIDENCE FOCUSES ON A QUANTUM OF MORAL BLAMEWORTHINESS THAT MAY ONLY BE EVALUATED BY A TRIER OF FACT. IT IS NOT DISPUTED THAT CERTAIN POTENTIAL MITIGATING EVIDENCE WAS IN EXISTENCE AND WAS NOT INVESTIGATED OR PRESENTED BY TRIAL COUNSEL. THE STATE DID NOT OBJECT TO THE QUALIFICATOIN OF OR EVIDENCE PRESENTED BY THE APPELLANT'S EXPERT WITNESSES AT THE MOTION FOR NEW TRIAL HEARING, AND THE SAME WAS ADMITTED.

THE LAW AND PRECEDENTS

The United States Constitution states in the Sixth Amendment, in relevant part: "In all criminal prosecutions, the accused shall…have the assistance of counsel for his defense." The Texas Constitution in Article 1, Section 10, states, in relevant part: "In criminal prosecutions the accused shall…have the right of being heard by himself or counsel, or both…" Article 1.051(a), TEX. CODE CRIM. PROC., states, in relevant part: "A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding. The right to be represented by counsel includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding."

Ineffective assistance of counsel claims are evaluated under two-part test. *Strickland v. Washington*, 466 U.S. 668 (1984). *See, Thompson v. State,* 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Ineffectiveness claims cannot be "built on retrospective speculation," but must be firmly rooted in the record, with the record affirmatively demonstrating the alleged ineffectiveness.

Bone v. State, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Failure to satisfy either prong negates a reviewing court's need to consider the other. *Strickland*, 466 U.S. at 697; *Ex parte Martinez*, 330 S.W. 891, 901 (Tex. Crim. App. 2011). Reviewing court must "first analyze all allegations of deficient performance, decide whether counsel's conduct was constitutionally deficient, and, if so, then consider whether those specific deficient acts or omissions, in their totality, prejudiced the defense' " *Ex parte Miller*, 330 S.W.3d 610, 616, n. 10 (Tex. Crim. App. 2009) (quoting *Ex parte Nailor*, 149 S.W. 125, 130 (Tex. Crim. App. 2004)).

The record must demonstrate trial counsel's representation fell below an objective standard of reasonableness. *Villa v. State*, 417 S.W.3d 455, 462-63 (Tex. Crim. App. 2013); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). A reviewing court indulges strong presumption counsel's conduct falls within wide range of reasonable, professional assistance, motivated by sound trial strategy. *See, Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). "If counsel's reasons for his conduct do not appear in the record and there is the least possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Ortiz v. State*, 93 S.W.3d 79, 88-89 (Tex. Crim. App. 2002). When trial counsel's reasons do not appear in record, appellate court should not find deficient performance unless challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 757 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see, Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). The standard of review is much more deferential to trial counsel's actions when the claim is asserted for the first time on direct appeal because "'[t]he reasonableness of counsel's choices often involves facts that do not appear in the appellate record[,]'" *Rylander v. State*, 101 S.W.3d

107, 110 (Tex. Crim. App. 2003) (quoting *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002)), and because "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Id*. at 111 (quoting *Bone*, 77 S.W.3d at 836). This measure of deference, however, must not be watered down into a disguised form of acquiescence." *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (finding ineffective assistance where counsel failed to request medical records and relied on court-appointed competency examination when he knew client had escaped from mental institution).

The second *Strickland* prong requires showing that deficient performance prejudiced defense such that, but for the deficiency, there is a reasonable probability trial result would have been different. *Strickland*, 466 U.S. at 694; *Tong*, 25 S.W.3d at 712. A reasonable probability is a probability sufficient to undermine confidence in outcome. *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009). Thus, in order to establish prejudice, an applicant must show "that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result was reliable." [*Strickland*, 466 U.S.] at 687. The *Strickland* test "'of necessity requires a case-by-case examination of the evidence.'" *Williams v. Taylor*, 529 U.S. 362, 382 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment)).

The Appellant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Allegations of ineffectiveness must be based on the record, and the presumption of a sound trial strategy cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 269 (Tex. Crim. App. 1999). The reviewing court must look to the totality of the representation, and its decision must be based on the facts of the

particular case, viewed at the time of counsel's conduct so as to eliminate hindsight bias. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. In all cases, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Id.* at 696, 104 S.Ct. 2052. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

A criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance to his client—in or out of the courtroom. *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982). Thus, "counsel has a duty to make *reasonable* investigations." *Strickland*, 466 U.S. at 691 (emphasis added). "'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003) (quoting *Strickland*, 466 U.S. at 690). However, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* (quoting *Strickland*, 466 U.S. at 691); *see Ybarra*, 629 S.W.2d at 946.

"[A] tactical choice not to pursue one course or another 'should not be confused with the duty to investigate.'" *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir, 1990), (quoting *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981)). "To do no investigation at all on an issue that not only implicates the accused's only defense…is not a tactical decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum." *Id.* "It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after

counsel has notice of the client's history of mental problems." *Id.*; *Freeman v. State*, 167 S.W.3d 114, 119 (Tex. App.—Waco 2005, no pet.) (citing *Bouchillon* as support for conclusion that failure to investigate was unreasonable and quoting above passage parenthetically); *Conrad v. State*, 77 S.W.3d 424, 426 n.13 (Tex. App.—Fort Worth 2002, pet. ref'd) (same).

Accordingly, in any criminal case, counsel must first evaluate what "conceivable line[s] of mitigating evidence" exist and then decide whether following any of those lines would likely lead to evidence that "would . . . assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. The reviewing court must decide whether the attorney's decision either to forego investigation, or to stop investigating at some later point, was reasonable "'under prevailing professional norms.'" *Id.* at 522–23 (quoting *Strickland*, 466 U.S. at 688). In evaluating whether counsel's decisions were reasonable under the norms of the profession, the reviewing court must defer to trial counsel's decisions required by *Strickland*, taking into consideration "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*. at 527. Counsel's performance must be viewed objectively and "'from counsel's perspective at the time.'" *Id*. at 533 (quoting *Strickland*, 466 U.S. at 689).

In an adversarial system due process requires at least a reasonably level playing field at trial. *DeFreece v. State*, 848 S.W.2d 150, 159 (Tex. Crim App. 1993). That means more than just an examination by a "neutral" psychiatrist. *Id*. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense. *Id*. We recognize that the accused is not entitled to a psychiatrist of his choice, or even to one who believes the accused

was insane at the time of the offense. *Id*. The adversarial model rests on the assumption that each party to a dispute, motivated by self-interest, will develop his position to the greatest extent possible within the boundaries of the rules of evidence and procedure, thus providing the factfinder an optimal vantage from which to gauge all relevant facts and make an informed decision on the merits. *Id*. at 158. In *Ake* the Supreme Court reiterated that where the defendant is indigent, due process requires that the State guarantee he be at least minimally equipped to participate meaningfully in this adversarial process. *Id*. citing to *Ake v. Oklahoma* 470 U.S. 68 (1985).

If any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance… a privately retained attorney should be held to no lower standard. *Ex Parte Briggs*, 187 S.W.3d 458, 469 (Tex. Crim App. 2005). The vital guarantee of the Sixth Amendment would stand for little if the often-uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.... [W]e see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. *Id.* (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). Failure by applicant's attorney to take any steps to subpoena the treating doctors, withdraw from the case because applicant's indigency prevented him from providing constitutionally effective assistance of counsel, or request state-funded expert assistance under *Ake,* constituted deficient performance. *Briggs* at 469. Trial counsel's financial decision to do nothing about the obvious need to develop evidence did not reflect reasonable professional judgment and was not a "strategic" decision made after a full investigation of the facts and law. *Id*.

An appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if the trial judge's opinion was clearly erroneous and arbitrary. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling. *Id*. This deferential review requires the appellate court to view the evidence in the light most favorable to the trial court's ruling. *Id*. The appellate court must not substitute its own judgment for that of the trial court and must uphold the trial court's ruling if it is within the zone of reasonable disagreement. *Id*. When the trial court denies a motion for a new trial alleging ineffective assistance of counsel a reviewing court should "view the relevant legal standards through the prism of abuse of discretion." *Ramirez v. State*, 301 S.W.3d 410, 415 (Tex. App.—Austin 2009, no pet.).

ANALYSIS OF ISSUE

ISSUE, RESTATED:

IS IT ERROR TO DECLARE TRIAL COUNSEL INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE WHEN, AT THE MOTION FOR NEW TRIAL HEARING, APPELLANT PRESENTED NO EVIDENCE DEMONSTRATING THAT THE INVESTIGATION AND ADDITIONAL EVIDENCE WOULD HAVE BEEN BENEFICIAL?

There is no question that trial counsel for Appellant knew of the history of sexual abuse suffered by the Appellant early in his representation, and knew that it could be a "factor in this case when it goes to court". (2 RR 4). Bennett told the trial court that "it would be good to have a -- new ideas put into our system and new things to work with, Judge. And -- and I would like to learn it. I would like to learn what these theories are and how they approach it, personally." (2 RR 5). However, Bennett proceeded to put all of his eggs in one basked, that of seeking a manslaughter conviction, and unreasonably failed to investigate this mitigating evidence. (9 RR

81-82). Bennett seemed to lack a basic understanding of mitigating evidence and questioned how a lawyer could investigate what would happen at punishment. (9 RR 81). In any criminal case, counsel must first evaluate what "conceivable line[s] of mitigating evidence" exist and then decide whether following any of those lines would likely lead to evidence that "would . . . assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). The reviewing court must decide whether the attorney's decision either to forego investigation, or to stop investigating at some later point, was reasonable "'under prevailing professional norms.'" *Id.* at 522–23 (quoting *Strickland*, 466 U.S. at 688). Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Id*. *Wiggins at* 521–22 (2003) (quoting *Strickland*, 466 U.S. at 690). Mr. Bennett's decision to forego efforts at investigation of mitigating evidence was not reasonable under the *Wiggins* standard.

Bennett testified that the only effort he made to seek expert assistance in this matter was filing a motion suggesting incompetency and insanity with the trial court. (9 RR 72). Bennett spoke with the trial court appointed psychologist, who laughed off his request to evaluate the Appellant to see if the fact that Appellant was sexually abused as a child might have been a "point in the murder". (9 RR 70). Bennett's request to that psychologist was also outside the scope of the trial court's order on the motion he had presented. (2 RR 7; CR 23). In an adversarial system due process requires at least a reasonably level playing field at trial. *DeFreece v. State*, 848 S.W.2d 150, 159 (Tex. Crim App. 1993). That means more than just an examination by a "neutral" psychiatrist. *Id*.

At the hearing on his motion, the trial court specifically informed Bennett that, "If the

defense wishes a different expert for purposes of trial, then they can petition the Court for that or hire their own expert." (4 RR 7). Bennett was aware that he could petition the trial court for *ex parte* relief to appoint an expert witness to aid in his defense of the case, but he has never sought such relief and did not start with this case. (9 RR 61). He did nothing more than give the Appellant's family one phone number and make a few phone calls. (9 RR 65-70).

Bennett made conflicting representations to the trial court regarding whether Appellant could afford the expert assistance Bennett was attempting to seek. At the hearing on the motion for competency, Bennett told the trial court that "if my client had the money and the resources -- he don't even have a job now -- I'm sure I could get him and his family to do it, if they had the money. But they don't have the money." (2 RR 5). When asked by Appellant's appellate counsel at the motion for new trial hearing if he was aware that his client had the money to pay the doctor he was seeking, he said they did. (9 RR 62). Bennett was clear that he would not spend any of $25,000.00 attorney fee assisting the Appellant in obtaining expert assistance. (9 RR 84).

If any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance… a privately retained attorney should be held to no lower standard. *Ex Parte Briggs*, 187 S.W.3d 458, 469 (Tex. Crim App. 2005). Trial counsel's financial decision to do nothing about the obvious need to develop evidence did not reflect reasonable professional judgment and was not a "strategic" decision made after a full investigation of the facts and law. *Id*. Bennett's decision to forego a reasonable investigation in Appellant's case was obviously financially motivated and accordingly falls short of the standard set forth in *Briggs*. Further, as Mr. Files testified, "the idea of asking for a disinterested expert in the case rather than to have your own expert, as suggested by *Ake* and then *DeFreece*, is just

remarkable. I don't know how anyone can justify having -- having made that decision. I don't know how anyone can suggest that he was really asking for an *Ake* expert but, gosh, he just did it wrong." (9 RR 48).

The State argues that there is missing information needed to measure trial counsel's performance, to-wit: "(1) the type of abuse; (2) the extent and duration of the abuse; (3) the lasting impact, if any, of the abuse on Appellant, physically and mentally; (4) whether the abuse has any relationship to Appellant's conduct in killing his wife[1]; and (5) the precise causal relationship, if any." The prior sexual assault of the Appellant happened in Gregg County, everyone involved in the Appellant's case was aware that he had been and that it that was prosecuted there. (9 RR 47). It wasn't a "Maybe it happened," or "It could have happened." *Id*. There's no question but that it did happen; there is a Court of Appeals opinion on it. (9 RR 47; CR 87-94). Appellant's trial counsel obviously knew that he had an individual who had been sexually assaulted and then in punishment he put on family member lay witness who testified that the Appellant had been sexually assaulted, but he did not give the jury anything besides that. (9 RR 49).

The sentencing jury in *Wiggins* heard only one significant mitigating factor, that Wiggins had no prior convictions. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Had the jury been able to place [Wiggins'] excruciating life history, suffering from gang rapes and sexual abuse and in different foster homes, on the mitigating side of the scale, the Court found that there is a reasonable probability that at least one juror would have struck a different balance. *Id*. The

1 State's counsel has obviously not fully grasped the facts of this case, the victim, K.W., was not Appellant's wife.

Appellant had similar, verifiable evidence available to offer in this case, but his trial counsel failed to offer it.

The type of evidence that could have been sought out and presented to the jury in Appellant's case was presented to the trial court through the testimony of Wade French, Ed.D. Before this court, the State asserts that the admissibility of this evidence is not established. However, before the trial court, the state made no objections during the direct examination of Dr. French by Appellant's counsel. (8 RR 12-25). Appellant asserts that the State allowed the evidence presented by Dr. French to be admitted without questioning his qualifications or challenging the reliability or the relevancy of the evidence presented and it therefore cannot complain about the same for the first time before this Court. The state's arguments regarding admissibility are a non-starter.

The also State argues that ineffective assistance for failure to call an expert witness cannot be established until it is shown that the witness was available and would have testified favorably for the defense, citing *Ex Parte White*, 160 S.W.3d 46, 52 (Tex. Crim App. 2004). *White* is distinguishable from the state at bar in that it is a case involving the failings of trial counsel at the first phase of a trial regarding presentation of evidence from specific fact witnesses. *See White* at 52. Here, Dr. French, an expert witness testifying after trial was completed, testified he has presented to triers of fact information about trauma as mitigating evidence for a defendant, and has found that information helpful to them. (8 RR 19-20). Dr. French also testified that he has primarily worked in the area of risk assessments having to do with the probability of certain future behaviors occurring. (8 RR 22). In the context of a risk assessment Dr. French would look at certain predisposing factors to determine how many of

them were present, to what degree they are present, and their severity to render an opinion on the probability that certain future behaviors would occur. (8 RR 22). Dr. French is able to and has in the past provided testimony to a trier of fact about the probability of someone's future risk or future danger. (8 RR 23). If asked, Dr. French could interview a person, determine whether or not they have had specific traumas and offer an opinion as to how that affects them to a trier of fact. (8 RR 24). Dr. French testified that his standard fee for a risk assessment or to evaluate someone and determine if past instances in their life could be presented as mitigating evidence is $2,500.00. (8 RR 25). Dr. French ended his testimony by stating that none of this type of testimony could be presented if nobody requested that he do it. (8 RR 30). The evidence was available to trial counsel and could have been offered through Dr. French or some other expert witness, but it wasn't.

Dr. French defined mitigating evidence as something that would reduce a person's moral blameworthiness. (8 RR 19). The only evidence presented to the finder of fact regarding mitigation of the Appellant's punishment was the testimony of his father, Michael Hudgins and his maternal grandmother, Betty Jean Tucker. (7 RR, 25-35). The court of appeals rightfully asserted that conviction for murder or manslaughter was inevitable at Appellant's trial and the sentencing phase was critical. *See Hudgins v. State*, No. 12-15-00153-CR, 16, 2017 Tex. App. Lexis 597 (Tex. App. –Tyler Jan. 25, 2017) (not designated for publication). This is not a case where Appellant is asserting on appeal that his counsel had failed to assert that he was incompetent or failed to argue a rightful insanity defense, distinguishable from the state's cited cases *Ex Parte Imoudu*, and *Ex Parte Lahood.* Here his retained counsel wholly failed to present available, relevant evidence in mitigation of Appellant's punishment of which he was acutely

aware. There is no way to know what impact this evidence would have had before the jury without presenting it to a jury.

CONCLUSION

The Evidence presented to the trial court regarding Mr. Bennett's deficient performance meets both prongs of the *Strickland* standard viewed in light of its further interpretation by the U.S. Supreme Court in *Wiggins*, and by the Texas Court of Criminal Appeals in *Briggs*. The trial court accordingly abused its discretion in overruling the Appellant's motion for new trial and the court of appeals was correct in reversal of that decision.

III. Prayer

Upon the issue presented, Appellant prays that this court affirm the court of appeals' decision, and a remand for a new punishment hearing, and for any such other relief at law he may be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 8, 2017, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Gregg County, 101 E. Methvin Street, Longview, TX 75601, and Stacey M. Soule, Office of the State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711, via the electronic filing manager.

J. Brandt Thorson

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 14,376 words according to the computer program used to prepare the document.

J. Brandt Thorson